shore owners, who had made no allegation of unseaworthiness, the ship-owners could not be held responsible because they did not negative a possible case which was not alleged against them in the pleadings *nor made against them in the course of the trial.*" (the emphasis is ours).

The latter case may also be distinguished from the instant case and this is clear from the judgment of Ong C.J. delivering the judgment of the court that both in the plaintiff's statement of claim and "repeatedly in her evidence she stated that she had alighted from the bicycle and was standing on the grass verge when the car knocked her down, being on its wrong side of the road whilst the defendants alleged that the bicycle came out without stopping at the junction."

The case under consideration is simple and straightforward. Although the appellant pleaded in her statement of claim that she was "lawfully walking along the proper side of the road," in her evidence she clearly said that she was walking across the road. Moreover in her police report included in the Agreed Bundle of Documents (Ex.P.1) at the trial she stated that she was crossing the road. Indeed the defendant in his defence and his evidence stated that the plaintiff was crossing the road from left to right.

It is clear therefore that the defendant was not misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the plaintiff's pleading because from the very outset it was the contention of and the case for the defendant, that the plaintiff was walking across the road and not along the road.

On appeal the learned Judge allowed the appeal but for different reasons. He appreciated that the plaintiff's evidence was contrary to her pleadings, but in view of other findings he did not think it necessary to lay too much emphasis on technicalities.

In this court in the case of *K.E.P. Mohamed Ali* v. *K.E.P. Mohamed Ismail*[5] the learned Chief Justice Raja Azlan Shah delivering the judgment of the court at p. 12 said –

"As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been properly excluded."

In another case *Playing Cards (Malaysia) Sdn. Bhd. v. China Mutual Navigation Co. Ltd.*[6] in this court, Abdoolcader J. delivering the judgment of the court, said that "although the pleadings in this case were not very precise, both parties knew the case presented by the other and justice required that the substantive issue between the parties be considered."

We are of the view that in the circumstances of this case the learned President of the Sessions Court was entitled to consider the case having regard to the whole of the evidence and to decide it in a manner as was just between the parties.

What remains for consideration is whether it was proper for the appellate court to disturb the finding of the learned President based on the material evidence before him and who had the advantage of seeing and hearing the witnesses. We hardly think so as the question for determination by the learned President was essentially one of fact. The principle that should guide an appellate court in this regard is to be found in Privy Council case of *Yahaya bin Mohamad v. Chin Tuan Nam.*[7]. This was a running down case where the crucial issue was on which side of the line the collision took place. The Judge considered the evidence of witnesses, the sketch plan and police photograph and arrived at a specific finding of fact. The Privy Council held that the finding of a Presiding Judge should not have been disturbed. It is only in a rare case that "an appellate court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial Judge on the question of credibility." We are of the same view that an appellate court may be justified in coming to a different conclusion if there is valid reason to think that the trial Judge had not taken proper advantage of his having seen and heard the witnesses.

Evidence reveals that in the instant case the respondent saw the appellant an old lady some 30 feet away about to cross the road and the possibility of danger was therefore apparent. That being the case a special duty was created to take precautions and the failure by the respondent to take them was negligence (see *Chan Peng Fook v. Kan Pak Lee*[8] per Hashim J). The learned President, in our view, correctly found as a fact that the respondent was negligent and that the appellant was herself not free from blame when she attempted to cross the road without fully ascertaining that it was safe to do so. We see no valid reason to hold that the apportionment of liability 50-50 was unwarranted by the evidence.

For these reasons, we allowed the appeal with costs and restored the order made by the learned President.

Appeal allowed

Solicitors: *Rethina & Co.; Bala Mahesan & Co.*

SAMANTHA MURTHI v. ATTORNEY-GENERAL MALAYSIA & ORS.

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya) & Salleh Abas F.J.) April 26 & May 6, 1982]

[Kuala Lumpur – Federal Court Civil Appeal No. 39 of 1982]

Legal Profession – Application for admission to Malayan Bar – Advocate and Solicitor admitted to practise in Malaya but not holding practising certificate in Malaya – Whether in active practice in Malaysia – Meaning of "Malaysia" – Legal Profession Act, 1976, ss. 3, 11, 12, 13, 29.

Interpretation – Promoting general legislative purpose.

In this case the appellant petitioned for admission to the Malaysian Bar. He had read in the chambers of Mr. K.C.I. Reddy in Kuching and subsequently for seven months in the chambers of Mr. Vijandran in Kuala Lumpur. He was an Army officer but had been specially given leave to enable him to read in the chambers of Mr. Reddy. Mr Reddy had been admitted to practise as an advocate and solicitor in the High Court, Malaya but he had migrated to Sarawak and had not been in possession of a practising certificate in Malaya after 1963. The respondents opposed the petition of the appellant and the learned Judges of the High Court upheld the objections and dismissed the petition. It was held that Mr. Reddy was not an advocate and solicitor under section 3 of the Legal Profession Act, 1976, as he did not hold a practising certificates under section 29 of the Act authorising him to practise at the Malayan Bar; and

he was not in active practice in Malaysia, as he had not possessed a practising certificate to practise in Malaya, after 1963. The appellant appealed to the Federal Court.

Held: (1) in this case as Mr. Reddy had been admitted and enrolled as an advocate and solicitor of the High Court, Malaya he was an advocate and solicitor under section 3 of the Legal Profession Act, 1976, even though he did not have a practising certificate under the Act;

(2) as Mr. Reddy had been in active practice in Sarawak, which is part of Malaysia, there is no doubt that he has been in active practice in Malaysia within the meaning of section 13(1) of the Legal Profession Act, 1976.

Case referred to:–

(1) *Nothman* v. *Barnet London Borough Council* [1978] 1 W.L.R. 220, 228.

[The following case was also cited in argument – *Shamsiah binte Ibrahim* v. *Attorney-General & Ors.* [1981] 1 M.L.J. 164]

FEDERAL COURT.

D.P. Vijandran for the appellant.

Datuk Mansor Ali, Senior Federal Counsel, for the Attorney-General

Param Cumaraswamy for the Malayan Bar Council.

K.L. Cheah for the Selangor and Federal Territory Bar Committee.

Suffian L.P. (delivering the Judgment of the Court): We allowed this appeal and now give our reasons.

Mr. M. Samantha Murthi was an Army Officer. He was also a Barrister having been called by Lincoln's Inn, and so is a "qualified person" for the purpose of admission to the Malayan Bar (section 3 of the Legal Profession Act, Act 166). He also qualified for admission to the Sarawak Bar. When serving in Sarawak he read in the Chambers of Mr. K.C.I. Reddy in Kuching and was in due course admitted to the Sarawak Bar under the Advocates Ordinance of Sarawak, Cap. 110.

Mr. Murthi was born in Penang. After leaving the Army he returned to live in Malaya, and with a view to being admitted to the Malayan Bar he began reading in Mr. Vijandran's Chambers in Kuala Lumpur. So far he has done seven months. Before completing the necessary period, in August 1981 he petitioned the High Court in Kuala Lumpur for admission to the Malayan Bar.

The three respondents, namely the Bar Council, Malaya; the Bar Committee, Selangor and Federal Territory; and the Attorney-General opposed the petition.

On February 6, the High Court consisting of three judges upheld the objections of the three respondents and dismissed the petition.

A qualified person may be admitted as an advocate and solicitor in Malaya if he satisfies, among others, two conditions: first, if he "has satisfactorily served in *Malaysia* the prescribed period of pupillage", which is 12 months, section 11 (d) and section 12(2). If the period spent by the appellant in Mr. Reddy's Chambers is not counted, then clearly he has not satisfied this requirement. On the other hand if that period is counted, he has. The respondents argued that that period should not be counted. Because of our conclusion on the other objection to be stated in a moment, there is no need for us to deal with this objection.

Secondly, the appellant must "serve this period of pupillage with an advocate and solicitor who is and has been in active practice in *Malaysia* etc.", section 13(1). As to this, the objection was that while Mr. Reddy has been admitted to practise as an advocate and solicitor in the High Court, Malaya, he has, however, ceased to so practise since his migration from Malaya to Sarawak where he is and has been practising and has not been in possession of a practising certificate in Malaya after 1963, and that the word Malaysia in section 13(1) must, it was argued, necessarily mean Malaya, as the Act has not yet been made applicable to those two States, and that accordingly the appellant has not complied with the requirement of section 13(1), and so the appellant's petition should be rejected, as indeed it was.

Thus the issue here was whether Mr. Reddy who practised in Sarawak was an advocate and solicitor who was or had been in active practice in Malaysia within the meaning of section 13(1) of the Act, such that he could have been a Master of pupils intending to be admitted to the Malayan Bar.

In our judgment, through the Act has not been made applicable to Sabah and Sarawak, since the word Malaysia in section 13(1) is not defined by the Act, it should be given its ordinary meaning, so as to include Sarawak.

We are fortified in our view by the fact that after Sarawak's entry into Malaysia, section 4(1) of the Advocates Ordinance of Sarawak – as well as section 4(1) of the Advocates Ordinance (Cap.2) of Sabah – was amended by the addition of a new paragraph (cc) to provide that a person contemplating admission to the Sarawak – or Sabah – Bar may read in the Chambers of an advocate who has been practising "in *some part* of Malaysia" – that is, not only in Sarawak or Sabah, but anywhere in Malaysia, including Malaya. The two amendments were made by the Modification of Laws (Advocates) (Borneo States) Order, 1965, published as L.N. 435 of 1965.

It is clear that the intention of the legislature when making these two amendments is to treat Sabah and Sarawak and Malaya as one country for the purpose of pupillage, while maintaining the separateness of the Bars of the three areas.

In our judgment the legislature must be regarded as manifesting the same intention when choosing the word Malaysia in section 13(1) of the Legal Profession Act.

The learned Judges who considered this section in the High Court were of the view that Mr. Reddy must be not only an advocate and solicitor under section 3 which he is, but he must also be one who is in possession of a practising certificate of Malaya; and that otherwise he cannot accept a pupil intending to be admitted to the Malayan Bar. With respect we do not agree.

What is in dispute in this case is the meaning which we should give to the phrase "active practice in Malaysia" in section 13(1). As earlier stated, that section provides that "a pupil shall serve his period of pupillage with an advocate and solicitor who is or has been in active practice in Malaysia etc." Thus there are two requirements: First, the master must be

(1) "an advocate and solicitor" within the meaning of section 3 of the Act; and

(2) he "is or has been in active practice in Malaysia".

The learned Judges in the High Court ruled that Mr. Reddy is not an advocate and solicitor under section 3 because he does not hold a practising certificate issued under section 29 of the Act authorizing him to practise at the Malayan Bar.

With respect we do not agree with this ruling, because there is nothing in section 3 to say that he must be in possession of such a certificate. In fact Mr Param Cumaraswamy conceded that Mr. Reddy is an advocate and solicitor under section 3. Under this section an advocate and solicitor is defined as:

"an advocate and solicitor of the High Court *admitted and enrolled* under this Act or under any written law prior to the coming into operation of this Act."

This section does not say that to be an advocate and solicitor one must have a practising certificate. In our judgment Mr. Reddy is an advocate and solicitor within the Act although he has no practising certificate under the Act. As long as he has been "admitted and enrolled" under the Act or any previous written law, he is an advocate and solicitor within the meaning of the Act. A practising certificate is not a requirement of section 3, but of section 29, which has nothing to do with the definition. The learned Judges were therefore in error when they said:

"He [Mr. Reddy] can only be a section 3 advocate and solicitor who is in practice if he holds a practising certificate issued under section 29 of the Legal Profession Act."

As regards the second requirement under section 13(1), i.e. that Mr. Reddy must be a person who "is or has been in active practice in Malaysia", there is no doubt that he is and has been in active practice in Sarawak which is part of Malaysia. It was argued by the respondents that because the Act has not yet been made applicable to Sabah and Sarawak, the word "Malaysia" should be construed to mean Malaysia without Sabah and Sarawak and that active practice in Sarawak is not active practice in Malaysia. With respect we do not agree. We think that the word "Malaysia" must be construed to include any "part of Malaysia", the very words used in the new paragraph (cc) of section 4(1) of the Advocates Ordinances of Sabah and Sarawak.

Moreover, the Legal Profession Act itself envisages one single bar for the whole of Malaysia, sections 2 and 41. It is only a matter of time before the three separate Bars become merged into a single Bar. In the interim period, the courts should wherever possible construe the Act purposively as will "promote the general legislative purpose" underlying the provision, the purpose of Parliament being to unite the three Bars, and not produce "an absurd and unjust situation", see Lord Denning M.R. in *Nothman* v. *Barnet London Borough Council*[1].

For the above reasons we allowed this appeal and remitted the petition for further consideration by the High Court in light of our judgment.

Finally, in a footnote to its judgment, the High Court remarked that the appellant was in full-time employment with the Armed Forces while reading in Mr. Reddy's Chambers, that he so read without leave from the Bar Council, and that on this fact alone his petition could have been rejected, because section 12(3) of the Legal Profession Act says:

"No qualified person shall, without the special leave in writing of the Bar Council, hold any office or engage in any employment of any kind, whether full-time or otherwise, during his period of pupillage".

But though no leave was obtained, the Bar Council based their objection squarely on section 13(1). Before us Mr. Vijandran informed us from the Bar that this self-same objection was made before the Court considering the appellant's petition for admission to the Sarawak Bar. The same objection was not however made by the Bar Council in the Kuala Lumpur High Court nor before us; presumably because, as the High Court in Sarawak was informed, the Army had given their blessing to the appellant reading in Mr. Reddy's Chambers and had specially given him leave to enable him to do so.

Appeal allowed.

Solicitors: *D.P. Vijandran Associates.*

LEMBAGA LETRIK NEGARA, MALAYSIA v. RAMAKRISHNAN

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. and Abdoolcader J.) April 13 & May 11, 1982]

[Penang – Federal Court Civil Appeal No. 240 of 1980]

Torts – Occupier's liability – Duty of occupier of land to trespasser – Whether general duty of care co-exists with duties arising from occupation of land – Knowledge of danger to persons coming on land – Failure to take steps in light of common humanity and in the light of circumstances and financial limitations – Breach of duty – Contributory negligence.

This was an appeal from the decision of the High Court reported in [1981] 2 M.L.J. 347. The respondent was a ten year old boy who climbed up a H-pole (erected and maintained by the appellants) in an attempt to release a bird which was trapped on the wire of the pole. The respondent was electrocuted as he reached the bracket which supported the cable-box. He was thrown to the ground and suffered severe injuries. The claim was based on the negligence of the appellants in having erected and maintained the H-pole which carried high-voltage electric wires immediately adjoining an unfenced public footpath in a padi field in Bayan Lepas, Penang, which H-pole and wires constituted a dangerous hazard and allurement to the respondent and for breach of statutory duty under the Electricity Regulations, 1951. The defence was a bare denial of negligence and breach of statutory duty but in the course of arguments before the High Court and the Federal Court, the main contention was that the respondent was a trespasser and therefore the relationship of occupier/ trespasser fell into consideration. The learned trial judge decided the case on the basis that it was a straightforward case of negligence, based on the *Donoghue* v. *Stevenson*[1] principle. He held the appellant liable for breach of duty to take care but failed to consider the issue of contributory negligence which was pleaded in the statement of defence.

The appellant appealed,

Held: (1) on the evidence the present case is a case of occupier/ trespasser on the simple ground that the respondent trespassed on the property of the appellants and therefore the principles in *British Railways Board* v. *Herrington*[8] and *Southern Portland Cement Limited* v. *Cooper*[9] are applicable;

(2) the duty owed to trespassers arises when the occupier knows facts which show a substantial chance that they may come to a place where there is a danger which he has created or knows about, and the duty is discharged by the occupier taking such steps to avoid it in accordance with the dictates of common humanity and in the light of his own circumstances and financial limitations;